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NOTES.

SUBROGATION IN ITS RELATION TO THE LAW OF TRUSTS.—The general rule that one paying a debt primarily due from another is in equity entitled to enjoy whatever means the creditor had of enforcing payment by the principal debtor,[1] is worked out through the theory that the party so discharging the obligation is substituted to the creditor's former position.[2] It is in accordance with this theory that a surety who has discharged the principal's debt stands in the creditor's place,[3] and apparently as a derivative corollary of this rule security in a

[1]Orrick *v.* Durham (1883) 79 Mo. 174; Begein *v.* Brehm (1889) 123 Ind. 160; Joselyn *v.* Edwards (1877) 57 Ind. 212.

[2]Jackson *v.* Boylston Ins. Co. (1885) 139 Mass. 508; Gans *v.* Thieme (1883) 93 N. Y. 225.

[3]Lake *v.* Brutton (1856) 8 DeG. M. & G. 440.

surety's hands may in some circumstances be reached by the creditor.[4] But where the principal obligation and the security are closely identified, as if the debt is secured by a bond, there is the logical objection to substitution after payment by the surety that nothing remains to be substituted to.[5] Yet many courts have swept aside this difficulty,[6] which, it seems, should consistently have been held to extend to security merely collateral to the debt.[7]

This doctrine of subrogation, said to rest on "pure equity and benevolence,"[8] seems to have been transplanted from the civil law.[9] Nevertheless, administered by courts of equity, it has doubtless derived its character from the doctrines of that system which has developed our law of trusts; and it seems that were it professedly regarded as germane to that law, the difficulty above referred to would disappear, and with it much haziness as to what subrogation is. If, for instance, it were avowedly agreed that securities, including the principal obligation, supplied by a debtor to secure the debt, were impressed with a quasi trust for the benefit of the surety, then upon payment by the latter they would not be extinguished, but in equity transferred to him. And indeed the rights of a creditor bear evidences of being in fact subject to such an equity.[10] As above pointed out, in many States the principal obligation is kept alive for the surety's benefit. Besides this, equity requires a creditor to do nothing prejudicial to the surety's right to subrogation, and if he does so the surety is *pro tanto* discharged.[11] Again, the surety becomes entitled to an assignment,[12] and a stranger taking the security with notice takes subject to the equity.[13] Similarly in cases of insurance the insurer is *pro tanto* discharged if the insured releases from liability one legally responsible for the damage,[14] while such a release is no defence to one

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[4]Loehr *v.* Colborn (1883) 92 Ind. 24; Maure *v.* Harrison (1692) 1 Eq. Cas. Abr. 93; Daniel *v.* Hunt (1884) 77 Ala. 567.

[5]Copis *v.* Middleton (1823) 1 Turn. & R. 224; see Hodgson *v.* Shaw (1834) 3 M. & K. 183; 1 Story, Eq. Jur., (13th ed.) §§ 499-*b* and 499-*c*. This difficulty has been removed in England by legislation. Mercantile Law Amendment Act, 19 & 20 Vict., c. 97, § 5.

[6]Lumpkin *v.* Mills (1848) 4 Ga. 343; Townsend *v.* Whitney (1878) 75 N. Y. 425; Smith *v.* Rumsey (1876) 33 Mich. 183. This difficulty was avoided by the Roman Law on the theory that payment by the surety effected a sale of the debt to him by the creditor. See 1 Story, Eq. Jur., (13th ed.) § 500. Without the notion of a trust that theory seems a fiction.

[7]See Townsend *v.* Whitney *supra.*

[8]Cottrell's Appeal (1854) 23 Pa. 294.

[9]Lumpkin *v.* Mills *supra;* Baylie, Suretyship, 356; Sheldon, Subrogation, (2nd ed.) § 1.

[10]Shaw, C. J., in Hart *v.* Railroad (Mass. 1847) 13 Met. 99.

[11]Pearl *v.* Deacon (1857) 24 Beav. 186; Guild *v.* Butler (1879) 127 Mass. 386; Baker *v.* Briggs (Mass. 1827) 8 Pick. 122; Cummings *v.* Little (1858) 45 Me. 183; see Forbes *v.* Jackson (1822) L. R. 19 Ch. Div. 615.

[12]Forbes *v.* Jackson *supra;* McCullom *v.* Hinckley (1837) 9 Vt. 143.

[13]Cummings *v.* Little *supra; cf.* Eastman *v.* Foster (Mass. 1844) 8 Met. 19; Ross *v.* Wilson (Miss. 1846) 7 Sm. & M. 753; Carpenter *v.* Brewer (1868) 42 Miss. 28.

[14]Packham *v.* Germ. Fire Ins. Co. (1900) 91 Md. 515.

who took it with notice of the insurer's rights.[15] All of these facts fit into the notion that whatever one may become entitled to be subrogated to is substantially a trust *res*.

In some instances the notion of a trust is avowedly applied to the subject-matter of a right of subrogation. This seems to explain the right of creditors of an insolvent trustee authorized to continue the testator's property in a business, to proceed against that property.[16] The same principle accounts for a creditor's right to security held by the surety for the payment of the debt,[17] a class of cases illustrated by *People* v. *Metropolitan Surety Co.* (1911) 132 N. Y. Supp. 835. In that case both principal and surety were insolvent, and the former had deposited certain cash with the latter as collateral to his bond. This the court held that the creditor was entitled to reach as a *cestui que trust*. A distinction, however, is taken between cases where the security was given as a provision for the payment of the debt in case of default by the principal, and where it is held strictly for the personal indemnity of the surety.[18] In the former case the creditor may reach the security as being impressed with a trust for payment of the debt,[19] and accordingly in such case the creditor's lien seems to rest on intention. But although this cannot be true where the security was strictly for the surety's personal protection, even here the creditor's equity is held to exist, at any rate where surety and principal are both insolvent.[20] The explanation of this must be that as a surety can reach his creditor's security, so equity will impress a trust in favor of the latter on property in the former's hands in any way dedicated to meeting liabilities connected with the obligation in question. Had the surety met the debt the security would have been lost to the principal's general creditors, and would substantially have reached the hands of the particular one. Accordingly it seems proper that equity should raise a trust in the latter's favor rather than that the general creditors should profit at his expense by an event so little concerning them as the surety's insolvency.[21]

EFFECT UPON PRIOR WILL OF THE NULLIFICATION OF SUBSEQUENT REVOKING OR INCONSISTENT WILL.—The principle that a republication is necessary to make effective a will which has been rendered void, was

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[15]Hart *v.* Railroad *supra;* West of England Fire Ins. Co. *v.* Isaacs L. R. [1897] 1 Q. B. 226.

[16]Strickland *v.* Symons (1884) L. R. 26 Ch. Div. 245; Lewin, Trusts, (12th ed.) § 794-*a;* see Laible *v.* Ferry (1880) 32 N. J. Eq. 791.

[17]Daniel *v.* Hunt *supra;* Chambers *v.* Prewitt (1898) 172 Ill. 615; Vail *v.* Foster (1850) 4 N. Y. 312; Eastman *v.* Foster *supra.*

[18]Sheldon, Subrogation, (2nd ed.) § 160.

[19]Sheldon, Subrogation, (2nd ed.) §§ 154, 155; Daniel *v.* Hunt *supra;* Chambers *v.* Prewitt *supra;* Vail *v.* Foster *supra;* Eastman *v.* Foster *supra.*

[20]Sheldon, Subrogation, (2nd ed.) §§ 160, 162; *In re* Fickett (1881) 72 Me. 266; Kelly *v.* Herrick (1881) 131 Mass. 373; Thompson *v.* Taylor (1878) 12 R. I. 109; Keyes *v.* Brush (N. Y. 1830) 2 Paige 311.

[21]In the principal case the cash security had all been paid out by the surety and nothing substituted for it. Inasmuch as there was consequently no trust *res* which could be identified, it seems impossible to sustain the result. Cavin *v.* Gleason (1887) 105 N. Y. 256; see Taylor *v.* Plumer (1815) 3 M. & W. 562.